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Comment on Recent Cases

EASEMENT: EXTINGUISHMENT BY DESTRUCTION OF SERVIENT TENEMENT.—There may be an estate in a horizontal section of real property as well as in a vertical. In the so-called "sky leases" of office buildings in large cities, that portion of the premises is granted which lies above a horizontal plane a certain distance from the ground. Similarly one may hold a freehold interest in a building separate from the estate in the land,¹ or even in one part of the building.² The same is true of easements. These may be appurtenant to the fee or to a lesser estate.³ Either the dominant or servient tenement may be the whole of the property or some part thereof.⁴ The easement may be imposed on some particular structure as distinct from the land,⁵ or on some part of the structure for some particular use.⁶

As has been stated, there are three elements of an easement,⁷ (1) the parcel of land to which it is appurtenant, (2) the parcel subject thereto, (3) the right itself. The extent and duration of the right is measured by the purpose or use for which it is given, and by the extent of the two estates. If the purpose for which it was granted becomes impossible the easement is lost.⁸ As there can be no easement in absence of a dominant and a servient estate,⁹ the total destruction of either extinguishes the easement. Hence it terminates if the land subject thereto is washed away by flood.¹⁰ And it is extinguished by the destruction, without the fault of the owner, of the structure on which it is imposed.¹¹ As the utmost extent of the obligation of the owner of the servient tenement is not to interfere with the enjoyment of the easement,¹² there is no obligation on his part to restore it after its destruction.¹³ Nor can he be prevented from replac-

¹ Washburn, *Real Property* (3 Ed.), p. 17, Sec. 20; *Badger Lumber Co. v. Stepp* (1900), 157 Mo. 366, 57 S. W. 1059.

² *Loring v. Bacon* (1808), 4 Mass. 575.

³ *Hoffman v. Savage* (1818), 15 Mass. 130.

⁴ *Day v. Walden* (1881), 46 Mich. 575, 10 N. W. 26; *Douglas v. Coonley* (1898), 156 N. Y. 521, 66 Am. St. Rep. 580.

⁵ *Taylor v. Hampton* (1827), 4 McCord (S. C.) 96; *Day v. Walden*, supra, n. 4.

⁶ *National Co. v. Donald* (1859), 28 L. J. Ex. 185, 4 Hurl. & N. 8, 157 Eng. Rep. R. 737; *Negaunee etc. Co. v. Iron etc. Co.* (1903), 134 Mich. 264, 96 N. W. 468.

⁷ 14 Cyc. 1139, note 2.

⁸ Washburn on Easements 654, 657; *Hahn v. Baker Lodge* (1891), 21 Ore. 30, 27 Pac. 166.

⁹ Gale, On Easements, p. 8.

¹⁰ *Weis. v. Meyer* (1891), 55 Ark. 18, 17 S. W. 339.

¹¹ *Bonney v. Greenwood* (1902), 96 Me. 335, 52 Atl. 786; *Day v. Walden*, supra, n. 4.

¹² Supra, n. 9.

¹³ *Hottell v. Farmers' Protective Assoc.* (1898), 25 Colo. 67, 53 Pac.

ing it by another structure upon which the easement could not operate. So the right of way over a particular stairway is lost when the building of which it is a part is burned. In *Cohen v. Adolph Kutner Co.*¹⁴ the plaintiff by the terms of his conveyance had a right of way over the stairway in the building of the defendant on the adjoining lot. After its destruction by fire when the defendant attempted to erect another building without a similar stairway, the plaintiff sought to enforce the easement. In accordance with decisions in similar cases in other jurisdictions,¹⁵ the court held that the plaintiff had only a right of way in the particular stairway and this was extinguished when the building burned. The words of the grant, "to her heirs forever," and that, "the said way shall be forever of the dimensions aforesaid," referred only to those particular stairs, and gave no larger right than a use thereto during their existence.

The easement is not lost, however, if there still remains some part of the servient tenement to which it can attach.¹⁶ And it has been held that if the building is replaced by another exactly like it, the easement will revive,¹⁷ but there are cases contra.¹⁸ And where the servient tenement is to furnish something to the dominant the destruction of the present means will not extinguish the right. So if power is to be provided, the right survives the destruction of the existing machinery through which it was transmitted.¹⁹ This case is the nearest approach to a definite affirmative easement requiring the continuation of a positive act. If the parties had drawn their conveyance so as to restrict the defendant from building beyond a certain line or closing the space occupied by the stairway, there would have been an equitable servitude or restrictive covenant, that would have survived and been enforceable.²⁰ But none of these features were present, and the case presents no exception to the general rule that the destruction of the servient tenement extinguishes the easement.

A. W. B.

EVIDENCE: PRIVILEGED COMMUNICATIONS TO PHYSICIANS: WAIVER.—A recent amendment to section 1881 of the California Code of Civil Procedure provides that in a suit for personal injuries the injured person or his personal representative is deemed to have consented to the testimony of any physician who has pre-

327; *Thorn v. Wilson* (1887), 110 Ind. 325, 11 N. E. 230.

¹⁴ (Feb. 23, 1918), 55 Cal. Dec. 427.

¹⁵ *Shirley v. Crabb* (1894), 138 Ind. 200, 37 N. E. 130; *Hahn v. Baker Lodge*, *supra*, n. 8; *Willard v. Calhoun* (1886), 70 Iowa 650, 28 N. W. 22.

¹⁶ *Bonney v. Greenwood*, *supra*, n. 11.

¹⁷ *Douglas v. Coonley*, *supra*, n. 4.

¹⁸ *Stenz v. Mahoney* (1902), 114 Wis. 117, 89 N. W. 819; *Cotting v. Boston* (1909), 201 Mass. 97, 87 N. E. 205.

¹⁹ *Hottell v. Farmers' Protective Assoc.*, *supra*, n. 13.

²⁰ *Gregory v. Ingwersen* (1880), 32 N. J. Eq. 199.